IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1360

LEO BRAMSON AND MARVIN WELFELD, individually and as Trustees for themselves and the limited partners of Chiglades Farm, Ltd., *Petitioners*

v.

EARL L. BUTZ, Secretary of Agriculture, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY MEMORANDUM

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1. In opposition to our petition, the federal respondents do not contest our view that the Secretary of Agriculture's regulation has devastatingly anti-competitive effects on the production and marketing of celery in Florida. There can be no real issue as to this result. The Florida Supreme Court pointed out as early as 1965, when it struck down a substantially identical state scheme, that it preserve a perpetual monopoly on celery production for those farmers who grew celery during the arbitrarily selected earlier period specified by the regulation.

The principal claim made by the federal respondents in answer to our antitrust argument is that the petitioners should not be permitted to assert their antitrust claim now since they did not raise it in the "rulemaking proceedings that preceded the adoption of the Marketing Order" in 1965 (Br. in Opp., p. 11).

It is true that the present petitioners did not appear in the rulemaking proceedings conducted by the Department of Agriculture in 1965. But it is simply wrong to assert that antitrust considerations were not "considered" because they had not "then been presented" to the Secretary (Br. in Opp., p. 11). The decision of the Department of Agriculture specifically stated with regard to one of the "exceptions" filed to the entire marketing program (30 *Fed. Reg.* 13708 (daily ed., October 28, 1965)):

> In their Exception No. 2 they assert, in substance, that the proposed order allegedly is unlawful because of similarity to the preceding Florida State program which was declared to be unlawful in *Rabin* v. *Conner,* 174 So. 2d 721, at page 725. The lawfulness of the Federal program, authority for which flows from the Agricultural Marketing Agreement Act of 1937, as amended, and from the Interstate Commerce powers of the Federal Constitution is, of course, unaffected by such State court ruling. The proposed Federal marketing order is authorized by the act and is supported by the hearing record. The exception, therefore, is denied.

The opinion of the Florida Supreme Court in *Rabin* v. *Conner,* reprinted as Appendix E to our petition, stated specifically that the Florida State scheme created "a controlled monopoly" (Pet., p. 89a). The Florida Supreme Court invalidated the state statute because, as it said, "The practical effect of this marketing order

is to grant to the holders of the permanent base quantity certificates a virtual monopoly on the production and sale of celery, to deny any other persons the right to participate in this lawful enterprise on any reasonably large scale basis, and to deny others the right to participate at all" (Pet., p. 87a).

Quite clearly, the challenge to the order based on the decision of the Florida Supreme Court tested the Secretary's power to confer on the Florida celery monopoly the power to exclude others from growing and marketing celery in that State. In a bare conclusionary statement that the order is "authorized by the act and is supported by the hearing record," the Secretary denied the "exception." Of course, those making the exception did not cite this Court's decision in *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, which was not decided until three years later. But the proposition that the proposed order created a monopoly for existing celery producers could not have been made more clearly—and could no more cavalierly have been disregarded.

2. Moreover, the 1965 rulemaking record refutes the assertion made the Solicitor General that this Marketing Order affects only the *sale* of celery and not its production. The decision issued by the Assistant Secretary of Agriculture regarding the proposed Marketing Order in 1965 stated (30 *Fed. Reg.* 13713 (daily ed., October 28, 1965)):

> As Florida celery producers have lost authority for continuing annual allotments to producers under the State program, proponents now support development of an annual allotment to producer type of program under Federal authority, *i.e.,* the act.
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> * * *

> Instability of annual supplies for marketing has had direct effect on prices to celery farmers. Such direct effects disrupt orderly marketing and impair farmers' purchasing power and tend to destroy the value of agricultural assets in the Florida celery industry which support the national credit structure.
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> The objectives of the marketing order are appropriate and the authorization of annual allotments is a proper means, under the act, for establishing more orderly marketing conditions by stabilizing annual marketable supplies of Florida celery.

In other words, the Department of Agriculture was saying in 1965 that in the interest of stabilizing the sale of celery in Florida, it would impose "allotment to producer" programs of the kind specifically forbidden by the Act. This law simply does not permit "allotments to producers," under any guise whatever, and it does not authorize such quotas even if they improve marketing conditions.

3. We note, finally that there is no merit whatever to the suggestion in the federal respondents' brief that the petitioners may not attack the anticompetitive consequences of the Act because they once, in total ignorance of their legal rights and on the basis of misrepresentations made to them, enjoyed its benefits. This Court finally and conclusively held in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 139-140 (1968), that the doctrine of *in pari delicto* "is not to be recognized as a defense to an antitrust action." Obviously, these petitioners have a very legitimate and proper desire to produce and market celery. So long as they were able to do so, they had no cause for complaint. Once the Marketing Order was applied

to exclude them from this lawful activity, their claim ripened and they could properly assert in this case all applicable invalidaties in the Marketing Order.

CONCLUSION

The issues presented by the present petition are not limited to the rights of these petitioners. If the production of celery is freed from the tentacles of the "controlled monopoly" imposed by the Secretary of Agriculture, other farmers will be able to produce that agricultural commodity for the benefit of consumers throughout the United States. Petitioners have, by this time, gone through several years of extended and expensive litigation to assert these rights. The Solicitor General's suggestion that the petitioners may now request the Secretary "to reconsider and amend the Marketing Order to take account of its alleged anticompetitive effects" mocks the orderly administrative process (particularly in view of the fact that the antitrust claims were fully asserted in the administrative proceedings in this case, see Pet. pp. 68a, 71a) and disserves the public interest. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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